Supreme Court, U. S.
FILED
MAR 19 1998
CLERK

No. 97-1363

In the

Supreme Court of the United States

OCTOBER TERM, 1997

ROGER SCHLOSSBERG, TRUSTEE,
Petitioner,

v.

STATE OF MARYLAND COMPTROLLER
OF THE TREASURY,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

ANDREW H. BAIDA*
Assistant Attorney General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-6318

SYLVIA J. BROKOS
Comptroller's Office
301 W. Preston Street
Room 410
(410) 767-1562

GERALD LANGBAUM
Assistant Attorney General
P.O. Box 466
Annapolis, Maryland 21401
(410) 974-2808

Attorneys for Respondent

Counsel of Record

11 pp

QUESTION PRESENTED

Does the Eleventh Amendment to the United States Constitution bar a federal suit that a bankruptcy trustee of the State of Maryland has brought against the State's Comptroller of the Treasury seeking to recover, as an avoidable transfer under 11 U.S.C. § 547, income taxes paid to the State?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 2

THE PETITION DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION 2

CONCLUSION 7

TABLE OF AUTHORITIES

CASES:

Close v. New York, 125 F.3d 31 (2nd Cir.1997) 6

College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 131 F.3d 353 (3rd Cir.1997) 6

Department of Revenue of Montana v. Kurth Ranch, 114 S.Ct. 1937 (1994) 3

Diaz-Gandia v. Dapena-Thompson, 90 F.3d 503 (1st Cir.1996) 7

Equal Employment Opportunity Commission v. Federal Labor Relations Authority, 476 U.S. 19 (1986) 3

Hans v. Louisiana, 134 U.S. 1 (1890) 3

Hoffman v. Connecticut Dept. of Income Maintenance, 492 U.S. 96 (1989) 6

Idaho v. Coeur d'Alene Tribe of Idaho, 117 S.Ct. 2028 (1997) 3

In re Sacred Heart Hospital of Norristown, 133 F.3d 237 (3rd Cir.1998) 4

In Matter of Merchants Grain, 59 F.3d 630 (1995) 6

Matter of Fernandez, 123 F.3d 241, *modified*, 130 F.3d 1138 (5th Cir.1997) 4, 5

Natural Resources Defense Council v. California Dept. of Transportation, 96 F.3d 420 (9th Cir.1996) 7
Ohio Agricultural Commodity Depositors Fund v. Mahern, 116 S.Ct. 1411 (1996) 5
Pennsylvania v. Union Gas, 491 U.S. 1 (1989) 4, 6
Powell v. Florida, 132 F.3d 677 (11th Cir.1998) 6
Seminole Tribe of Florida v. Florida, 116 S.Ct. 1114 (1996) 2, 4, 5, 6
Taylor v. Freeland & Kronz, 503 U.S. 638 (1992) 3

CONSTITUTIONAL AND STATUTORY PROVISIONS:

U.S. CONST.
ARTICLE I 4, 5, 6
ARTICLE I, § 8 3
ARTICLE I, § 8 cl. 3 6
ARTICLE I, § 8 cl. 4 6
ARTICLE I, § 8 cl. 8 6
ARTICLE III 4
AMEND. XI . . . . . *passim*
AMEND. XIV 2
AMEND. XIV, § 5 2

11 U.S.C. § 106 2
11 U.S.C. § 106(a) 6
11 U.S.C. § 547 . . . . . i, 1
11 U.S.C. § 547(c)(2)(B) 1

No. 97-1363

In the

Supreme Court of the United States

OCTOBER TERM, 1997

ROGER SCHLOSSBERG, TRUSTEE,
Petitioner,

v.

STATE OF MARYLAND COMPTROLLER
OF THE TREASURY,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner Roger Schlossberg, a trustee in bankruptcy, initiated this adversary proceeding in the United States Bankruptcy Court for the District of Maryland seeking to recover, as an avoidable transfer pursuant to 11 U.S.C. § 547, income taxes that the bankruptcy debtor had paid to the State of Maryland Comptroller of the Treasury. (App. 2.) The bankruptcy court and the district court each held that the debtor's income tax payment was not a voidable preference because it was made in the "ordinary course of business" as set forth in § 547(c)(2)(B). (App. 4.)

On the trustee's appeal to the United States Court of

Appeals for the Fourth Circuit, the State asserted that the trustee's action was barred by the Eleventh Amendment and that 11 U.S.C. § 106, which explicitly abrogates the States' immunity from preference actions such as this one, was an unconstitutional exercise of congressional power. After permitting the United States to intervene and defend the constitutionality of § 106, the court struck down the validity of that provision of the Bankruptcy Code and held that the trustee's suit is barred by the Eleventh Amendment.

Rejecting the United States' argument that § 106 is constitutional, the court of appeals held, "in light of *Seminole* [*Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996)], that Congress is not empowered to use Article I authority, specifically the Bankruptcy Clause, to circumvent the Eleventh Amendment's restriction on federal jurisdiction." (App. 13.) The court of appeals also held that § 106 was an "unconstitutional and ineffective" exercise of Congressional power under the Fourteenth Amendment, stating "there is no evidence that Congress either passed the Bankruptcy Code under § 5 of the Fourteenth Amendment or sought to preserve the core values specifically enumerated in that amendment. . . ." (App. 13.) The court accordingly vacated the lower courts' decisions and remanded the case with instructions to dismiss this case. This petition followed.

REASONS FOR DENYING THE WRIT

THE PETITION DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

Further review of this case is unwarranted because the central issue raised in the petition was not argued below and is insubstantial, and the remaining issue that petitioner raises -- almost as an aside -- has been resolved in a manner that conforms with prior decisions of this Court and similar decisions of other federal courts of appeals. The lower court's decision gives rise to no error that justifies the exercise of this Court's discretionary jurisdiction.

1. Petitioner never argued in the court of appeals, as he does here, that the Eleventh Amendment is inapplicable because he is a citizen of the same State that he sues. Rather, petitioner maintained only that the State waived its Eleventh Amendment immunity by filing a proof of claim in the underlying bankruptcy proceedings. Petitioner offers no reason for this Court to depart from its usual rule of not deciding "questions not raised or resolved in the lower court[s]." *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992) (quotations omitted) (brackets in original). *See also Department of Revenue of Montana v. Kurth Ranch*, 114 S.Ct. 1937, 1942 n.9 (1994); *Equal Employment Opportunity Commission v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986).

In any event, the issue that petitioner belatedly seeks to raise does not warrant this Court's review. Petitioner mistakenly asserts that "[i]n its recent treatment of issues related to the Eleventh Amendment, the issues here raised were not addressed by the Court." Pet. at 9. On the contrary, this Court as recently as last Term rejected "extended criticisms of the Court's recognition that the immunity can extend to suits brought by a State's own citizens," stating that it would "adhere to our precedent" because "[t]hese criticisms and proposed doctrinal revisions . . . have not found acceptance with a majority of the Court." *Idaho v. Coeur d'Alene Tribe of Idaho*, 117 S.Ct. 2028, 2033 (1997).

2. Although petitioner devotes most of the petition arguing that *Hans v. Louisiana*, 134 U.S. 1 (1890), should be revisited, he also asks the Court "to determine the important question of federal law whether the Eleventh Amendment bars a suit in federal court against a State by a trustee in bankruptcy of that State acting under that statutory scheme created by Congress pursuant to the Bankruptcy Clause of Article I., sect. 8 of the Constitution." Pet. at 8. To the extent this portion of a sentence places the issue properly before the Court, it is an issue that does not merit Supreme Court review. The court of appeals below

held, as have the two other federal appellate courts to have addressed this issue, that Congress has no power to abrogate the States' Eleventh Amendment immunity under the federal bankruptcy code. *See also In re Sacred Heart Hospital of Norristown*, 133 F.3d 237 (3rd Cir.1998); *Matter of Fernandez*, 123 F.3d 241, *modified*, 130 F.3d 1138 (5th Cir.1997). The court of appeals decided no exceptional questions of federal law in reaching this conclusion; indeed, it is compelled by this Court's decision in *Seminole Tribe of Florida v. Florida.*

The core holding in that case makes clear that Congress may not unilaterally abrogate the State's immunity under Article I of the United States Constitution: "The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." 116 S.Ct. at 1131-32. This language unambiguously demonstrates that the Eleventh Amendment is not limited solely to the exercise of Congress's Indian Commerce Clause powers at issue in *Seminole* or its more general Commerce Clause powers at issue in *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989), which the Court in *Seminole* overruled. On the contrary, as Justice Stevens observed in his dissenting opinion in *Seminole*, the Court's holding applies to federal statutes enacted pursuant to any Article I power, and "prevents Congress from providing a federal forum for a broad range of actions against the States, from those sounding in copyright and patent law, to those concerning bankruptcy, environmental law, and the regulation of our vast national economy." 116 S.Ct. at 1134 (footnote omitted).

The Article I Bankruptcy Clause at issue here does not differ in any material respect from the Indian Commerce Clause or the national Commerce Clause. The Bankruptcy Clause is certainly no more plenary and exclusive than is the Indian Commerce Clause, which the Court in *Seminole* found divested the States "of virtually all authority over Indian commerce and Indian tribes." 116 S.Ct. at 1126.

See also Matter of Fernandez, 123 F.3d at 244 ("We find no principled reason to distinguish in a relevant way Congress' Commerce Clause power that it purported to exercise in *Seminole Tribe* from its power under the Bankruptcy Clause for the purposes of state sovereign immunity."). Moreover, as the Court in *Seminole* stated, "the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government." 116 S.Ct. at 1131. Rather, "[e]ven when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." *Id.*

In a footnote immediately appended to the last quotation, the Court made clear that its decision applies with equal force to cases such as this. Rather than deny Justice Stevens's assertion that, under the Court's decision, "persons harmed by state violations of federal copyright, bankruptcy, and antitrust laws have no remedy," *id.* at 1134 n.1, the majority stated that "[t]his Court never has awarded relief against a State under any of those statutory schemes." *Id.* at 1132 n.16. This passage removes any possible doubt concerning the applicability of the Court's holding to bankruptcy cases and confirms, as the court of appeals in this case observed, that "the Bankruptcy Clause's provision for the enactment of '*uniform* laws on the subject of Bankruptcies'" does not provide a basis for "Congressional powers under this clause to be distinguished from other Article I powers for purpose of reconciliation with the restraints imposed by the Eleventh Amendment." (App. 10) (emphasis in original).

The court of appeals' decision is thus entirely consistent with *Seminole*, as it is with other decisions of the Court and opinions of individual Justices. *See Ohio Agricultural Commodity Depositors Fund v. Mahern*, 116 S.Ct. 1411 (1996) (remanding for further consideration in light of *Seminole* the Seventh Circuit's decision in *In Matter of*

Merchants Grain, 59 F.3d 630 (1995), in which the court held that 11 U.S.C. § 106(a) was a proper abrogation of the States' Eleventh Amendment immunity). *See also* App. 10 (quoting *Hoffman v. Connecticut Dept. of Income Maintenance*, 492 U.S. 96, 111 (1989) (Marshall, J., dissenting), for the proposition that there is "no reason to treat Congress' power under the Bankruptcy Clause any differently [than the Commerce Clause power, as addressed in *Union Gas*], for both constitutional provisions give Congress plenary power over national economic activity.") (brackets supplied by the court of appeals); *Hoffman*, 492 U.S. at 105 (Scalia, J., concurring) (stating that *Pennsylvania v. Union Gas* "involved Congress' powers under the Commerce Clause, but there is no basis for treating its powers under the Bankruptcy Clause any differently."); *Seminole*, 116 S.Ct. at 1142 (Stevens, J., dissenting) ("I see no reason to distinguish among statutes enacted pursuant to the power granted to Congress to regulate Commerce among the several States, and with the Indian Tribes, Art. I, § 8 cl. 3, the power to establish uniform laws on the subject of bankruptcy, Art. I, § 8 cl. 4, [and] the power to promote the progress of science and the arts by granting exclusive rights to authors and inventors, Art. I, § 8, cl. 8. . . .").

The decision below is in complete accord with these authorities. Moreover, the petition fails to identify any issue on which the lower courts require this Court's guidance. In addition to speaking with one voice in the bankruptcy area, virtually every federal appellate court to have addressed the validity of legislation passed pursuant to Congress' other Article I powers has held that Congress lacks authority to abrogate the States' Eleventh Amendment immunity. *See, e.g., College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 131 F.3d 353 (3rd Cir.1997) (Trademark Remedy Clarification Act of 1992); *Powell v. Florida*, 132 F.3d 677 (11th Cir.1998) (Fair Labor Standards Act); *Close v. New York*, 125 F.3d 31 (2nd Cir.1997) (same); *Natural Resources Defense Council*

v. California Dept. of Transportation, 96 F.3d 420 (9th Cir.1996) (Clean Water Act); *but see Diaz-Gandia v. Dapena-Thompson*, 90 F.3d 503 (1st Cir.1996) (Veterans' Reemployment Rights Act passed under the War Powers Clause). The petition should be denied, therefore, because it presents no issue warranting this Court's review.

CONCLUSION

For the reasons stated, the petition should be denied.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

ANDREW H. BAIDA*
Assistant Attorney General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-6318

SYLVIA J. BROKOS
Comptroller's Office
301 W. Preston Street
Room 410
(410) 767-1562

GERALD LANGBAUM
Assistant Attorney General
P.O. Box 466
Annapolis, Maryland 21401
(410) 974-2808

Attorneys for Respondent

Counsel of Record